



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

DOCKET FILE COPY ORIGINAL
REFER TO OUR FILE

February 2, 1998

By Hand Delivery and First Class Mail

Magalie R. Salas, Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RECEIVED

FEB - 2 1998

RE: CC Docket No. 96-45
In the Matter of the Federal-State Joint Board on Universal Service
Reconsideration Petition of the Pennsylvania Public Utility Commission
Memorandum Opinion and Order of January 2, 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Ms. Salas:

On behalf of the Pennsylvania Public Utility Commission, I am filing this Petition for Reconsideration of the Common Carrier Bureau's (CCB) Memorandum Opinion and Order of January 2, 1998.

Sincerely,

Joseph K. Witmer,
Assistant Counsel

No. of Copies rec'd
List ABCDE

0419

CERTIFICATE OF SERVICE

I, Joseph K. Witmer, hereby certify that I have on this 2nd day of February, 1998, served a true and correct copy of the Petition for Reconsideration of the Pennsylvania Public Utility Commission of the Common Carrier Bureau's Memorandum Opinion and Order of January 2, 1998 in CC Docket 96-45 upon the persons and in the manner indicated below:

Via Overnight Delivery:

Magalie R. Salas, Secretary
Office of the Secretary
FCC
1919 M Street, NW
Washington, DC 20554

Jeannie Grimes
Common Carrier Bureau
FCC
2000 M Street, NW, Suite 235
Washington, DC 20554

ETS
1231 20th Street, NW
Washington, DC 20036

William E. Kennard
Commissioner
FCC
1919 M Street
Washington, DC 20554

A. Richard Metzger, Chief
Common Carrier Bureau
FCC
1919 M Street, NW, Room 500
Washington, DC 20554

Marianne Gordon
Common Carrier Bureau, Room 500
FCC
1919 M Street
Washington, DC 20554

Susan Ness, Commissioner
FCC
1919 M Street, NW
Washington, DC 20554

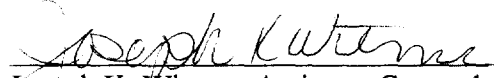
Harold Furchgott-Roth
Commissioner
FCC
1919 M Street, NW
Washington, DC 20554

Michael Powell
Commissioner
1919 M Street, NW
Washington, DC 20554

Gloria Tristani
Commissioner
FCC
1919 M Street
Washington, DC 20554

Daniel Python, Chief
Wireless Telecommunications
FCC
2025 M Street, NW, Room 5002
Washington, DC 20554

Geraldine Matise
Common Carrier Bureau, Room 500
FCC
1919 M Street
Washington, DC 20554


Joseph K. Witmer, Assistant Counsel
Pennsylvania Public Utility Commission
✓ P. O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-3663

CC Docket No. 96-45
PaPUC Reconsideration Petition
2/2/98

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	CC Docket No. 96-45
)	
Federal-State Joint Board on)	
Universal Service)	

**COMBINED PETITION FOR RECONSIDERATION OF
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

I. INTRODUCTION

Pursuant to Sections 1.49, 1.51 and 1.52, as well as 1.06(a)(1) and (f) of the Federal Communications Commission (FCC or Commission) Rules of Practice and Procedure, 47 C.F.R. §§1.49, 1.51, 1.52 and 106(a)(1) and (f), the Pennsylvania Public Utility Commission (PaPUC) submits this Petition for Reconsideration (Petition) on behalf of the PaPUC as well as the Center for Rural Pennsylvania of the Pennsylvania General Assembly (CRP), the Office of Information Technology (OTI), the Pennsylvania Rural Development Council (PRDC), the Pennsylvania Department of Education (PDE), and the Office of Rural Health of Penn State University. The PaPUC respectfully requests that the Commission's Common Carrier Bureau (CCB) grant reconsideration of the CCB's Memorandum Opinion and Order of January 2, 1998 (the Pennsylvania Decision) and provide the PaPUC with the relief set forth in this Petition.

II. SUMMARY OF PENNSYLVANIA'S POSITION

1. The PaPUC supports the Petition with new and relevant supplemental evidence, not reasonably discoverable at the time of the initial pleadings, sufficient to warrant reconsideration under the law and the Commission's regulations. The PaPUC further supports the Petition with the observation that this new and relevant supplemental evidence is substantially likely to affect the implementation of Sections 254(b) and 254(h) of the TA-96.¹

2. The PaPUC also supports the Petition with new circumstances, developed in more detail below, showing the Pennsylvania Decision never explained in detail what evidence was necessary to establish the "special circumstances" justifying an exception to the OMB-Goldsmith definition under the FCC's rules. The PaPUC believes that reconsideration and analysis of the PaPUC's new evidence is necessary to remedy this lack of detail. The PaPUC has, with that in mind, submitted the Petition and new evidence to remedy this defect with the kind of detail states should be expected to provide when seeking a waiver from the definition.

¹See 47 C.F.R. §1.106; W.S. Butterfield Theatres, Inc. v. Federal Communications Commission, 99 App DC 71, 237 F.2d 552 (1956); Re Armond J. Rolle, 31 FCC2d 553 (1971).

3. The PaPUC also supports the Petition with new claims, not capable of being raised before, that the Pennsylvania Decision imposes an inadvertent, but very real, inequity and hardship on counties east of the Mississippi River. The PaPUC evidence illustrates that rural counties east of the Mississippi will experience a disproportionate impact if the CCB applies a rigid and inflexible definition to all rural areas of the nation. This new claim is premised on 1990 Census Bureau definitions and data that are available throughout the nation.

4. The PaPUC believes that the omissions, the absence of detail on what constitutes special circumstances, and the hardship and inequity in the Pennsylvania Decision can be remedied by granting the Petition and endorsing the proposed four-part test, set forth in more detail below, for waiver requests under Section 251(h) of the Act.

5. The PaPUC proposes a non-binding test to guide current and future requests for waivers from the OMB-Goldsmith definition which, if applied, justifies granting Pennsylvania a waiver. First, the states would be expected to show that the county is less than 50% urbanized as defined by the U.S. Census Bureau. Second, the states would have to show that each county contains no “central city” as defined by the US Census Bureau. Third, the states would have to show the existence of prior commitments to the county, such as education or health care initiatives, based on the county’s rural status. Finally, the states would have to provide other

corroborating evidence that tended to establish that the county was different from an urban county. States able to make these showings would be granted a waiver from the OMB-Goldsmith definition as a “modified non-urbanized” exception to the general definition.

6. Pennsylvania’s nine counties meet the criteria of “modified non-urbanized” rural areas based on 1990 Census Bureau definitions and data. Each of the nine counties has a population that is less than 50% urbanized and no county possesses a central city. In addition, Pennsylvania developed initiatives before the Act that focus on the challenges facing these rural counties. Each county contains school districts that do not meet the definition of urban school districts and the counties have designated health care shortage areas. The PaPUC submitted corroborating evidence showing that these counties contain rural telcos as defined under the Act and that all nine rural counties pay higher T-1 rates, compared to urban counties, to obtain the basic and advanced telecommunications envisioned by the Act.

III. BACKGROUND

7. On January 2, 1998, the Commission’s Common Carrier Bureau (CCB or Bureau) issued a Memorandum Opinion and Order (Pennsylvania Decision) denying the PaPUC’s request for a waiver from the definition of “rural area” contained in Section 54.5 of the

Commission's rules. The PaPUC submits this Petition urging the CCB to reconsider that prior determination and grant alternative relief.²

8. Section 254(b)(2) of the TA-96 generally requires that the cost for telecommunications be just, reasonable, and affordable. Sections 254(b)(2) and (b)(3) of the TA-96 also require that services be provided to all regions of the Nation and that services be provided to rural areas at a level of quality and at a price comparable to that provided for similar services in urban areas.

9. Section 254(h)(1)(A) of the Telecommunications Act of 1934, as amended, requires the Commission to adopt a definition of "rural area" to determine the location of health care providers eligible for universal service support and to determine the "comparable rural areas" used to calculate the credit or reimbursement provided to a telecommunications carrier that provides telecommunications services to health care providers at reduced cost. The discount for health care providers can be secured **only** if the health care provider is located in a rural area.

²In the Matter of the Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Memorandum Opinion and Order, January 2, 1998 (the Pennsylvania Decision). The nine rural Pennsylvania counties are Butler, Carbon, Columbia, Fayette, Lebanon, Perry, Pike, Somerset, and Wyoming. See Appendix A and Appendix A-1.

Section 254(h)(1)(B) provides a discount for schools and libraries although there is an additional discount for schools and libraries in rural areas.

10. The trigger for the discounts is whether the rural area meets the FCC's definition. The FCC's definition relies upon the Office of Management and Budget's (OMB) list of Metropolitan Statistical Areas (MSAs), and census blocks or tracts in metropolitan counties identified by the Goldsmith Modification (the OMB-Goldsmith definition). In the absence of a waiver from that definition, a rural county cannot acquire the rural health care discount nor the additional discount for schools and libraries.

11. In 1997, the PaPUC submitted a request for a waiver from the OMB-Goldsmith definition on behalf of nine Pennsylvania counties. The PaPUC request rested on, among other things, a significantly lower primary care physician-to-population ratio, a significantly higher proportion of residents living within designated areas of medical underservice, and significantly fewer hospitals and hospital beds.

12. The PaPUC bolstered the waiver request with a showing that the cost to the federal universal service program was minuscule. The cost of adding the affected 46 health care providers in the nine rural counties would only add an estimated \$475,087 (or less than 2/10 of

one percent of the \$400 million allocated for the health care program). The PaPUC further bolstered the waiver request by showing that the cost to include the 317 schools in the nine rural counties adds only \$544,555 (or less than 3/100 of one percent of the \$2.25 billion allocated for schools and libraries).

IV. ARGUMENT

13. The PaPUC hereby incorporates by reference prior comments submitted to the Commission in CC Docket No. 96-45 and Notice DA 98-2 to the extent they are consistent with and build upon this Petition (Universal Service Comments).³ The PaPUC also hereby incorporates prior submissions and evidence, in addition to any submissions or evidence offered by other filings, to the extent they are consistent with this Petition.

14. The PaPUC does not challenge the CCB's determination that WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969), cert denied 409 U.S. 1027 (1972) stands for the proposition that the very essence of a waiver request is the assumed validity of the general rule. Consequently, the PaPUC is not now contesting the OMB-Goldsmith definition because it represents a legitimate approximation of what constitutes a "rural area" for purposes of

³See Appendix A-1.

Section 254(h) so long as waivers are available in a rational and predictable manner. To that end, the Petition requests the CCB to apply the proposed waiver criteria and grant Pennsylvania the requested relief.

15. The PaPUC supports the Petition based on the evidence supporting the original waiver request, developments since the original waiver request such as the solicitation of Universal Service Comments in DA 98-2, and the new and supplemental evidence contained in this Petition. The PaPUC believes these considerations justify granting the Petition.

16. The PaPUC supports the Petition with new claims, not capable of being raised previously, about the presumptions and results of the Pennsylvania Decision. The PaPUC believes that the Pennsylvania Decision rests on a presumption that the OMB-Goldsmith definition encompasses every local situation in every state in every part of rural America unless a state can show "special circumstances." However, the Pennsylvania Decision never defined what considerations could establish special circumstances. Moreover, the PaPUC believes that such a rigid and inflexible application of the definition, when combined with the absence of detail on the meaning of what constitutes special circumstances, results in the inequitable denial of Section 254(h) benefits to many rural counties -- especially rural counties east of the Mississippi River that do not come within the OMB-Goldsmith definition.

17. The PaPUC also supports the Petition with the new claim, not capable of being raised previously, that the approach taken in the Pennsylvania Decision has the unintended effect of narrowing the broad definitions and policies intended by the Congress in the TA-96. This narrowing of the TA-96 will result in policies, both for rural Pennsylvania and the rural parts of America as a whole, that directly contravene the Act's plain meaning. The TA-96, contrary to the Pennsylvania Decision, was not premised on a rigid and unbending definition of a "rural area" nor did the Act require the inflexible application of the OMB-Goldsmith definition that was subsequently adopted by the FCC. Consequently, the PaPUC urges the CCB to provide more flexibility in granting waiver requests so that rural areas in America which do not come within the narrow confines of the OMB-Goldsmith definition are not denied the benefits intended by Congress.

18. The PaPUC further supports the Petition with a new claim, not capable of being raised previously, that the Pennsylvania Decision prevents many rural counties in America from obtaining the benefits provided by Section 254(h) of the TA-96 unless that rural county makes an affirmative showing that it comes within the OMB-Goldsmith definition. The PaPUC does not believe that Congress intended to make rigid distinctions premised either on geographic proximity to the Mississippi River or an ability to meet the narrow confines of the OMB-

Goldsmith definition. Moreover, the PaPUC contends that Congress never intended to force rural counties to make affirmative showings, tantamount to the burden of going forward, to secure benefits under the Act. Assuming, arguendo that such a requirement could be imposed based on the CCB's implementation authority, the PaPUC contends that the threshold cannot be unduly burdensome or produce irrational and discriminatory results. Consequently, the PaPUC urges the CCB to grant reconsideration and provide the relief intended by the Act in those few rural areas that do not come within the OMB-Goldsmith definition.

19. The PaPUC supports the Petition with the additional new claim, not capable of being previously raised, that the Pennsylvania Decision means that "rural areas" which fail to come within the OMB-Goldsmith definition, largely confined to states east of the Mississippi, are being denied benefits based on an irrational regional classification. That irrational result appears to be contrary to Section 254(b)(2) and (b)(3) requirements that access be provided on an equal basis to all regions of the Nation and on a comparable basis between rural and urban areas. The PaPUC is concerned that the absence of detail on special circumstances is perpetuating an irrational and discriminatory result not intended by the Congress. This confluence of approach and result is contrary to the requirement that rural areas be provided comparable services to those provided in urban areas under Section 254(b)(3) of the Act. The PaPUC urges the CCB to grant

reconsideration and thereby remedy the lack of detail on special circumstances and rectify the inadvertent discrimination stemming from the Pennsylvania Decision.

20. The PaPUC submits that these claims can be considered and resolved using the proposed non-binding waiver criteria in the Petition. The PaPUC believes that the end result will provide regulatory flexibility, preserve the FCC's definition, promote equity, eliminate hardship and discrimination among the states, and prevent unnecessary litigation.

21. To that end, the PaPUC is proposing a four-part test for evaluating waiver requests. First, states seeking waivers would be expected to show that the county is less than 50% urbanized as defined by the U.S. Census Bureau. Second, the states would have to show that each county contains no "central city" as defined by the US Census Bureau. Third, the states would have to show the existence of prior state commitments to the county, such as education or health care initiatives, based on the county's rural status. Finally, the states would have to provide other corroborating evidence that tended to establish that the county was different from an urban county. States able to make these showings would be granted a waiver from the OMG-Goldsmith definition as a "modified non-urbanized" exception to the general definition.⁴

⁴The suggestion that some kind of conceptual device be developed for determining waiver requests from the FCC's definition of rural is not unfounded. For example, peer-reviewed articles in the Journal of Rural Health from 1993 to 1993 proposed **26 different definitions of "rural" by researchers**. Webb, Karen D.; Baer, Leonard

22. The PaPUC supports its waiver criteria proposal and the Petition with new facts, not capable of being presented earlier, showing that the cost of using this modified non-urbanized concept in Pennsylvania is not prohibitive in each of the nine counties.⁵ Moreover, the CCB concedes that the net increase of including Pennsylvania's nine counties, not currently within the OMB-Goldsmith definition, adds 2/10 of 1 percent to the health care provision and 3/100 of one percent to the schools and libraries provision in Section 254(h) of the TA-96.⁶

23. The PaPUC supports its waiver criteria proposal and the Petition with new evidence, not capable of being presented earlier, showing that the use of this modified non-urbanized concept does not open a national floodgate. The maximum number of counties that could seek a waiver is approximately 229. Moreover, 177 of those counties, or 77%, are located east of the Mississippi River in the older colonial states of the North and South as well as the upper mid-west and mid-South. The number of rural counties would only increase from 2,385 under the OMB-Goldsmith definition to 2,614 (2,385 + 229) with the waiver criteria. Finally, Pennsylvania is not the largest beneficiary even though it has the nation's largest number of rural

D.; and Gesler, Wilbert, "What is Rural? Issues and Considerations," The Journal of Rural Health (Summer 1997): 253-256.

⁵See Appendix B.

⁶Pennsylvania Decision, pp. 3-4.

residents. The primary beneficiaries would be Georgia (20), Virginia (19), Tennessee (18), Ohio (14), Indiana (14), New York (12), and Kentucky (10) provided they were able to meet the four-part test set forth above.⁷

24. The PaPUC supports its waiver criteria proposal and the Petition with new evidence, not capable of presentation earlier, on estimated costs. The estimated total discount loss for the 229 counties capable of requesting a waiver is \$85,620,998 or barely .034 of the \$2.5 billion dedicated to the schools and libraries program. The estimated discount loss for the 177 counties east of the Mississippi is \$66,178,666 of that \$85,620,998 or .026 of the same \$2.5 billion.⁸

25. The estimated discount loss for all 229 counties under the rural health care provision is 12,088,223 or .030 of the \$400 million dedicated to the rural health care provisions of the Act. The estimated discount loss for the 177 counties east of the Mississippi is \$9,343,229 of that \$12,088,223 or .023 of the same \$400 million.⁹ The PaPUC does not believe that a modest increase in the 2-3% range, if every eligible rural county obtained a waiver, constitutes a

⁷See Appendix C and Appendix C-1.

⁸See Appendix D.

⁹See Appendix D.

financial deluge. That belief is underscored by the fact that 77% of the possible waiver requests would come from one region of the nation: rural counties east of the Mississippi River.

26. The PaPUC supports its proposed waiver criteria and the Petition with new evidence, not capable of presentation before, showing that every school district in the rural counties, except one, fails to meet the definition of an urban school district under Pennsylvania's Urban and Rural Teacher Loan Forgiveness Program. Moreover, that one school district is identical to every other school districts because it is situated in a rural county that has less than 50% of the population urbanized and also lacks a "central city" according to the U.S. Census Bureau. Finally, none of the rural health care sites in any of the nine counties are adversely affected by that one school district.¹⁰

27. The PaPUC supports its waiver criteria proposal and the Petition with new evidence, not capable of presentation earlier, showing a commitment to rural health care predating the Act. Pennsylvania enacted the Children's Health Care Act in 1992 to expand health care in designated rural areas. The Children's Health Care Act created a student loan

¹⁰ Act of December 6, 1988, P.L. 1259, No. 155, as amended, 24 P.S. §§5191-5198.7. Pennsylvania committed financial resources to provide comparable educational opportunities for rural Pennsylvanians, in advance of the TA-96, by enacting this program in 1988. The program provides for student loan forgiveness. It defines an urban school district as a population greater than 850 per square mile. See Appendix E; Appendix E-1; Appendix E-2.

forgiveness program to attract medical services and providers to rural counties. As of 1996, the PaPUC notes that 80% of the counties have municipalities designated as health professional shortage areas (HPSAs) under the Children's Health Care Act.¹¹ The PaPUC believes that rural counties, which collectively possess over 63 municipalities designated as HPSAs under law, cannot be reasonably considered to be urban counties.

28. The PaPUC supports its waiver criteria proposal and the Petition with new evidence, not capable of presentation earlier, showing that many of the nine rural counties are served by rural telephone companies as defined in the TA-96.¹² Moreover, these rural telcos are exempted from obligations under Section 251(f) of the Act because of their rural character and they may be required to promote the universal service support goals set forth in the Act. The PaPUC does not believe that a rural county served by rural telcos under the Act are urban if they lack a central city and have 50% or more of the population that is not urbanized according to the U.S. Census Bureau data. The PaPUC notes that each of the nine counties served by carriers that are not rural telcos under the Act must pay higher rates for similar services compared to the urban areas served by the same carrier.

¹¹See, Act of 2nd day of December, 1992, P.L. 1992-113; Appendix F; Appendix F-1.

¹²See Appendix G.

29. The PaPUC further supports the its waiver criteria proposal and the Petition with new evidence, not capable of being shown earlier, that the T-Rates used by these rural counties for advanced telecommunications are higher than in urban counties to the extent they are used to deliver services intended for schools and libraries and rural health care providers under Section 254(h) of the Act. Carriers have informed the PaPUC that a 2-mile length for urban areas and a 10-mile length for rural areas is their estimate of basic and mileage costs incurred to provide basic and advanced services to schools and libraries and health care providers.¹³

30. The PaPUC supports its waiver criteria proposal and the Petition with new evidence, not capable of being provided earlier, showing that under the FCC's Interconnection Order states are expected to implement a three-tier pricing structure based on density and access line data. Under that Interconnection Order, the nine counties in this Petition would be rural.

31. Finally, the PaPUC notes that those services eligible for universal service support in Pennsylvania are being delivered to some of the rural health care providers and schools and libraries using the services of cable companies, wireless carriers, and other carriers such as electric utility companies. This is an important consideration because many rural areas in

¹³Appendix H.

Pennsylvania are using other carriers to secure basic and advanced telecommunications service based on cost, quality, and prior Pennsylvania initiatives. The costs for providing services eligible for universal service support will increase to the extent that these rural areas cannot secure those services in a cost-effective manner from other carriers. Finally, the PaPUC believes that the current approach may constitute a form of technology and service provider preference that could be contrary to Section 254(h)(2) of the TA-96.

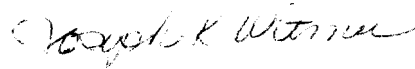
32. Consequently, the PaPUC urges the CCB to give very serious and deliberate consideration to its conclusion that only “common carriers” are eligible for the compensation for services rendered under Sections 254(h) of the TA-96

V. CONCLUSION

The PaPUC urges the Commission to grant the Petition and use the non-binding waiver criteria set forth in the Petition to grant Pennsylvania the relief requested and to provide guidance to other states on what considerations would justify a waiver from the OMB-Goldsmith definition. The PaPUC believes that the absence of detail on what constitutes “special circumstances” in the Pennsylvania Decision, the hardship and inequity imposed on counties east of the Mississippi River under a rigid and inflexible application of the OMB-Goldsmith

definition, and the spirit and intent of Congress justify a waiver from the OMB-Goldsmith definition for Butler, Carbon, Columbia, Fayette, Lebanon, Perry, Pike, Somerset, and Wyoming county. Finally, the PaPUC asks the CCB to consider permitting carriers such as wireless carriers, cable companies, and electric utilities as carriers eligible to deliver the universal service support provided under the Act and the Commission's regulations.

Respectfully submitted,



Joseph K. Witmer, Assistant Counsel
Pennsylvania Public Utility Commission

Frank Wilmarth, Deputy Chief Counsel
Pennsylvania Public Utility Commission
John F. Povilaitis, Chief Counsel
Pennsylvania Public Utility Commission

FOR:

Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

AND

John P. Bailey, Director
Office of Education Technology
Pennsylvania Department of Education
333 Market Street
Harrisburg, PA 17126
(717) 787-5820

Nicholas Giordano
Office of Information Technology
Telecommunications Policy
Finance Building, Room 310
Harrisburg, PA 17120
(717) 787-9111

Joseph Dudick, Executive Director
Pennsylvania Rural Development Council
506 Finance Building
Harrisburg, PA 17120
(717) 787-1954

Barry Denk, Director
Johnathan Johnson
The Center for Rural Pennsylvania
of The General Assembly of Pennsylvania
212 Locust Street, Suite 604
Harrisburg, PA 17101
(717) 787-9555

Myron Schwartz
Pa Office of Rural Health
The Pennsylvania State University
7 Armsby Building
University Park, PA 16802-5602
(814) 863-8214

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)
)

MEMORANDUM OPINION AND ORDER

Adopted: January 2, 1998

Released: January 2, 1998

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 30, 1997, the Pennsylvania Public Utility Commission ("Pennsylvania Commission") submitted a request for waiver of the definition of "rural area" contained in section 54.5 of the Commission's rules.¹ This definition is used to determine which health care providers are eligible to participate in the universal service support program² and also partially determines the discount rate for schools and libraries that are eligible for universal service support.³ We conclude that the Pennsylvania Commission has not demonstrated good cause justifying a waiver. Accordingly, we deny the Pennsylvania Commission's request.

II. BACKGROUND

2. With respect to support mechanisms for health care providers, section 254(h)(1)(A) of the Communications Act of 1934, as amended ("the Act"), requires the Commission to adopt a definition of "rural area" both to determine the location of health care providers eligible for universal service support, and to determine the "comparable rural areas" used to calculate the credit or reimbursement to a telecommunications carrier that provides

¹ 47 C.F.R. § 54.5.

² See 47 C.F.R. § 54.601(a)(4).

³ See 47 C.F.R. § 54.505(b)(3).

services to those health care providers at reduced rates.⁴ The Commission, adopting the approach recommended by the Federal-State Joint Board on Universal Service ("Joint Board"), defined a "rural area" as one that is located in a non-metropolitan county, as classified by the Office of Management and Budget's ("OMB's") list of Metropolitan Statistical Areas ("MSAs"), or is identified by the Goldsmith Modification published by the Office of Rural Health Policy of the U.S. Department of Health and Human Services ("ORHP/HHS").⁵ The Commission agreed with the Joint Board's conclusion that the MSA/Goldsmith approach is more easily used and administered than other proposals suggested for identifying rural areas.⁶

3. In addition, section 254(h)(1)(B) mandates that discounts for eligible schools and libraries must be "appropriate and necessary to ensure affordable access to and use of" the services designated for support.⁷ Building on the Joint Board's recognition that schools and libraries in high cost areas will confront relatively higher barriers to maintaining communications links, the Commission identified high cost schools and libraries as those located in rural, as opposed to urban, areas for purposes of determining discount amounts.⁸ The Commission concluded that, for purposes of discounts for telecommunications providers serving eligible schools and libraries, "rural area" is defined as non-metropolitan counties, as measured by the OMB's MSA list, and census blocks or tracts in metropolitan counties identified by the Goldsmith Modification.⁹

III. POSITION OF PARTIES

4. The Pennsylvania Commission contends that applying these rules will have an "adverse impact" on the schools, libraries and health care providers located in nine Pennsylvania counties.¹⁰ Specifically, the Pennsylvania Commission argues that, although

⁴ 47 U.S.C. § 254(h)(1)(A). *See also* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd at 9113 (1997) (Universal Service Order).

⁵ 47 C.F.R. § 54.5. *See also* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Recommended Decision*, 12 FCC Rcd at 441 at 441 (Recommended Decision).

⁶ Universal Service Order, 12 FCC Rcd at 9115-16.

⁷ 47 U.S.C. § 254(h)(1)(B). *See also* Universal Service Order, 12 FCC Rcd at 9035.

⁸ Universal Service Order, 12 FCC Rcd at 9042.

⁹ 47 C.F.R. § 54.505(b)(3)(ii).

¹⁰ Pennsylvania Commission petition at 1. The counties at issue are: Butler, Carbon, Columbia, Fayette, Lebanon, Perry, Pike, Somerset, and Wyoming. Pennsylvania Commission petition at 3.

these counties do not qualify as "rural" under the Commission's rules, they have a "strong 'rural' character and nature."¹¹ The Pennsylvania Commission cites various factors to demonstrate that a waiver is necessary, including, relative to 24 Pennsylvania counties classified as urban under the Commission's rules: a significantly lower primary care physician-to-population ratio; a significantly higher proportion of residents living within designated areas of medical underservice; and significantly fewer hospitals and hospital beds.¹²

5. In addition, the Pennsylvania Commission attaches to its petition an "Interim Report" prepared by the Pennsylvania Universal Telephone Service Task Force ("Pennsylvania Task Force").¹³ This report presents an analysis of the fiscal impact of (1) providing universal service support to the public or non-profit health care providers located in the nine counties at issue and (2) increasing by ten percent the discount percentage eligible schools and libraries located in these counties would receive if they were designated as rural.¹⁴ Based on its analysis, the Pennsylvania Task Force concluded that including the 46 health care providers located in the nine counties at issue would cost \$475,087.00, or less than 2/10 of one percent of the \$400 million dollar cap imposed on the health care portion of the universal service program.¹⁵ The Pennsylvania Task Force also concluded that the additional ten percent discount -- the most a school's discount can increase by reclassifying its location as rural -- would result in approximately \$504,955.00 of additional support for the 317 schools

¹¹ Pennsylvania Commission petition at 1.

¹² Pennsylvania Commission petition at 3. By the phrase, "designated areas of medical underservice," we interpret the Pennsylvania Commission to mean areas reporting demographics indicative of below-average medical care.

¹³ Interim Report Concerning the Definition of Rural Areas Prepared by the Subcommittee on Rural Health Care and Schools and Libraries, Pennsylvania Universal Telephone Service Task Force, adopted July 14, 1997 ("Pennsylvania Interim Report").

¹⁴ See Pennsylvania Interim Report at 5-7.

¹⁵ The Pennsylvania Task Force determined that there are 46 eligible health care providers located in the nine counties at issue. The Pennsylvania Task Force calculated the distance from the health care provider to the city with a population of 50,000 or more nearest to each health care provider; identified the incumbent local exchange carrier (LEC) for each health care provider and for each city with a population of 50,000 or more; calculated the maximum allowable distance for each health care provider; compared the rates for T-1 service offered by each incumbent LEC serving the health care provider in the nine counties with the rates for T-1 service available in the cities with populations of 50,000 or more. Pennsylvania Interim Report at 5-6. We note that the Pennsylvania Task Force did not provide specific prices indicating that the prices of a T-1 in these nine counties are similar to rates in rural areas in the state. Rather, in describing its method, the Pennsylvania Task Force states generally: "[f]or example, the local channel charge for a T-1 is higher in rural areas than in urban areas." *Id.* at 6.

located in the nine counties.¹⁶ The Pennsylvania Task Force also concluded that classifying the 55 libraries located in the nine counties would cost an additional \$39,600.00.¹⁷ Based on its calculations, the Pennsylvania Task Force concluded that designating the schools and libraries located in the nine counties would cost \$544,555.00, or less than 3/100 of one percent of the \$2.25 billion dollars of support that will be available for eligible schools and libraries.¹⁸

IV. DISCUSSION

6. Under section 1.3 of our rules, the Commission may waive any provision of its rules or orders if "good cause" is shown.¹⁹ The standard for good cause requires the petitioner to demonstrate that special circumstances warrant deviation from the rule and that such a deviation would better serve the public interest than the general rule.²⁰ The Court of Appeals for the D.C. Circuit has stated that a waiver may permit a more rigorous adherence to an effective regulation by allowing the agency to take into account considerations of hardship, equity, or more effective implementation of overall policy on an individualized basis, while also emphasizing that "[a]n applicant for waiver faces a high hurdle even at the

¹⁶ Pennsylvania Interim Report at 6. The Pennsylvania Task Force cited the Commission's estimate that schools nationwide will spend \$3.0 billion annually to purchase the technology services eligible for discounts. The Pennsylvania Task Force assumed that the weighted national average of discounts is 60 percent, and, thus, concluded that discounts for schools and libraries will cost \$1.8 billion. The Pennsylvania Task Force divided this amount by 113,000, its estimate of the total number of schools nationwide, to compute an approximate discount for each school of \$15,929.00. Using this number, the Pennsylvania Task Force determined that the maximum additional discount that would be available by reclassifying the 317 schools in the nine counties would be ten percent of the discount per school, or \$1,592.92. Multiplying this number by 317, the number of schools in the nine counties, the Pennsylvania Task Force estimated that designating these counties as rural would cost approximately \$504,955.00 in universal service support. *Id.*

¹⁷ Pennsylvania Interim Report at 7. The Pennsylvania Task Force estimated that libraries nationwide will spend \$180 million annually to purchase services eligible for discounts. The Pennsylvania Task Force also estimated that the national weighted average of discounts for libraries is 60 percent and, thus, calculated the cost of discounts on eligible services to be \$108 million. The Pennsylvania Task Force then divided this number by the total number of libraries nationwide (15,000) and determined that \$7,200.00 is the approximate discount per library. Assuming that a library's discount would increase by ten percent if a library was reclassified from urban to rural, the Pennsylvania Task Force determined that \$720.00 is the average amount of support that each such library would gain. Finally, the Pennsylvania Task Force multiplied \$720.00 by the number of libraries in the nine counties at issue (55) to calculate the approximate cost of the requested reclassification at \$39,600.00. *Id.*

¹⁸ Pennsylvania Interim Report at 7.

¹⁹ 47 C.F.R. § 1.3.

²⁰ See *Northwest Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972) (*WAIT Radio*).